

STATE OF MAINE  
YORK, ss.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. RE-09-111

ROBERT F. ALMEDER and VIRGINIA  
S. ALMEDER, et al.,

Plaintiffs

v.

TOWN OF KENNEBUNKPORT, et al.

Defendants

**ORDER**

Upon review of the Defendant Town of Kennebunkport’s Motion for Entry of Final Judgment pursuant to Rule 54(b) in Counts IV and VI of its counterclaim and the Town’s Conditional Stipulation filed therewith, the Court hereby FINDS that there is no just reason for delay and DIRECTS entry of final judgment in favor of the Town on Counts IV and VI of the Town’s Counterclaim, which judgment shall incorporate the Town’s Conditional Stipulation filed with its aforementioned Motion. Pursuant to the Law Court’s instruction in *Guidi v. Town of Turner*, 2004 ME 42 ¶ 9, 845 A.2d 1189 that “[i]n its certification, the trial court must make specific findings and a reasoned statement explaining the basis for its certification under M.R.Civ.P. 54(b)(1)” the Court hereby finds as follows:

1. For the convenience of the parties, and in particular, many of the Plaintiffs who are summertime residents of the area, the Court scheduled issues relating to prescriptive easement and custom for trial before issues of title were resolved.

2. The Court ruled in the Partial Judgment dated October 16, 2012 that the public has acquired a right to use the entirety of Goose Rocks Beach for recreational purposes by prescriptive easement and custom and the Plaintiffs and their attorneys have stated that they plan to appeal the Court's decision to the Maine Supreme Judicial Court.

3. In order to expedite the process of getting that issue to the Law Court on appeal so that the dispute between the Town and the Plaintiffs may be finally resolved without undue delay, the Town has filed a Conditional Stipulation, in which it has agreed to dismiss all remaining claims with prejudice and stipulate to the Plaintiffs' title if this Court's Partial Judgment is affirmed on appeal, which Conditional Stipulation has been incorporated into the final judgment entered here in accordance with M.R.Civ.P. 54(b)(1).

4. The Law Court has suggested several factors that should be considered by the trial court when deciding whether there is no just reason for a delay, specifically:

- The relationship of the adjudicated and unadjudicated claims;
- The possibility that the need for review may be mooted by future developments in the trial court;
- The chance that the same issues will be presented to [the appellate court] more than once;
- The extent to which an immediate appeal might expedite or delay the trial court's work;
- The nature of the legal questions presented as close or clear;
- The economic effects of both the appeal and any delays on all of the parties, including the parties to appeal and other parties awaiting adjudication of unresolved claims; and
- Miscellaneous factors such as solvency considerations, the res judicata or collateral estoppel effect of a final judgment and the like.

*Chase Home Finance LLC v. Higgins*, 2008 ME 96, ¶10, 953 A.2d 1131, 1134.

5. Applying those factors to this case, the Court hereby finds as follows:
- (a) The adjudicated prescriptive easement and custom claims and the unadjudicated title claims in this case rest on very different factual underpinnings;
  - (b) No future development in the trial court could moot the need for review (indeed, in light of the Town's Conditional Stipulation, future development in the trial court would be necessary solely so that the aggrieved Plaintiffs and Parties in Interest could appeal the existing Partial Judgment);
  - (c) In light of the Town's Conditional Stipulation, there is no likelihood that the Law Court will face the same issues – the existence of a prescriptive easement or easement by custom in this case – more than once: if the Law Court affirms this Court's partial judgment, the Town will have stipulated to the Plaintiffs' title to the beach, thereby fully resolving all issues in this case; and if the Law Court reverses this Court's decision, then any issues at trial and on appeal will be focused on title, not on the prescriptive easement/custom claims;
  - (d) An immediate appeal would expedite the trial court's work because the Town's Conditional Stipulation to dismiss with prejudice all of the Town's remaining claims (and the stipulation to judgment for the Plaintiffs) may obviate the need for a trial on title issues;
  - (e) The legal questions on appeal are not close but are clear because the case as decided is on all fours with the controlling precedent of *Eaton v. Town of Wells*, and the test for setting aside a Court's findings of fact is "clear error." *Eaton*, 2000 ME 176, ¶ 33, 760 A.2d 232, 244, making it likely that the trial court will be upheld on appeal, thereby obviating the need for any future title trial;

- (f) All parties would be better off economically by avoiding the need for a costly and time-consuming title trial when the primary dispute between the parties is whether the public has a right to use the beach; in particular, the seven Parties-in-Interest that asked to be bound by the Court's Partial Judgment as to prescription and custom do not have any further claims in the case; those parties should not be forced to wait for a time consuming title trial, and judicial economy weighs in favor of certifying the issue for all Plaintiffs as well; and
- (g) other miscellaneous factors weigh in favor of certification including the fact that the Town's fees and costs are borne by the public and the Town has no interest in pursuing its title claims if the Court's Partial Judgment is upheld; and, as the evidence at trial established, the ongoing nature of this litigation is divisive to the community which will be well served by an expedited resolution.

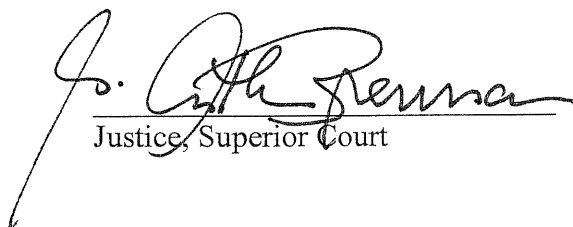
6. In addition, the issue of an unripe prescriptive easement claim because of an absence of joinder of the true owner does not exist here as in other cases. *See, e.g., Flaherty v. Muther*, 2011 ME 32, ¶85 n. 6 (When no party in the case held title, the Law Court has upheld the trial court's decision not to address a prescriptive easement claim on ripeness grounds); *Lamson v. Cote*, 2001 ME 109, ¶ 20, 775 A.2d 1134, 1139 (same). The only possible owners of the disputed property in this case are: 1) the Town, 2) the Plaintiffs or 3) the heirs of a predecessor in interest to the Plaintiffs who effected a severance of the beach at some time in the past. Because any heirs to Plaintiffs' predecessors in title have been served by publication and joined by order of the Court, all possible owners of the disputed property are parties to this case. Moreover, the Court here found that the prescriptive easement ripened with the knowledge and acquiescence of the Plaintiffs and their predecessors in title, and so the Law Court would be able

to uphold the prescriptive easement and custom claims on appeal even if title is held by the heirs of a predecessor in interest to the Plaintiffs. Furthermore, because the Town has entered a Conditional Stipulation disclaiming title if its prescriptive easement is upheld, the fact that the Town could not acquire an easement over land that it already owns should not dissuade the Law Court from hearing the appeal.

7. Finally, in addition to promoting judicial efficiency and economy, no party is prejudiced by this certification. The Plaintiffs lose nothing because the Town's Conditional Stipulation puts them in the same position on appeal that they would be in if they tried – and won – all of the title claims. Accordingly, it is in the best interests of all involved that the Partial Judgment be certified.

Dated:

11/29/12

  
Justice, Superior Court